Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Rachel L. Clay, Petitioner,

v.

Council of the District of Columbia,
Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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December 23, 1996

QUESTIONS PRESENTED

(1) Is the enactment of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. CODE ANN. § 1-601.1 *et seq.*) (locally known as and hereinafter referred to as the "CMPA") by the Council of the District of Columbia (D.C. City Council) and the Mayor of the District of Columbia, without any approval by the Congress or the President of the United States, an unconstitutional exercise of power in violation of the Bicameralism and Presentment Clauses when the CMPA amends 98 Acts of Congress and supersedes 73 Acts of Congress, all of which operate to deny to the petitioner her right to job protection and termination only for cause?

(2) Are the provisions of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (D.C. CODE ANN. §§ 1-227(e), -233(c), & -242(3)) (hereafter referred to as the "Home Rule Act") which directed and authorized the Council of the District of Columbia to adopt the CMPA an unconstitutional exercise of power in violation of the Bicameralism and Presentment Clauses, as interpreted by this Court in *Immigration and Naturalization Service v. Chadha* because the D.C. City Council enactment of the CMPA, which was mandated by the Home Rule Act, which amended and superseded myriad Acts of the

Congress without Congressional and Presidential approval all operated to deny to the petitioner her right to job protection and termination only for cause?

(3) Is the interpretation by the District of Columbia Court of Appeals of the nature of the petitioner's personnel rights under the Home Rule Act erroneous in that the Court's decision denied her rights to which she was previously entitled?

(4) Is the establishment of a local presidentially appointed Mayor-Council form of government for the District of Columbia by Reorganization Plan No. 3 of 1967 an unconstitutional exercise of power in light of *Chadha*; or, in the alternative, does the adoption of Pub. L. 98-532 cure the constitutional defect of reorganization plans and thus the District of Columbia Court of Appeals decision in *dicta* that the petitioner had no job protection and could be fired at whim was an erroneous interpretation of the protections that the petitioner enjoyed under the pre-Home Rule form of government?

(5) Does the remand by the District of Columbia Court of Appeals to the District of Columbia Office of Employee

Appeals in the instant case, when considered in light of the petitioner's initial personnel grievance which was filed on May 3, 1984—over 12 1/2 years ago—constitute a denial of procedural due process?

LIST OF PARTIES

From the administrative hearing examiner of the Council of the District of Columbia, to the Office of Employee Appeals, to the Superior Court of the District of Columbia, to the District of Columbia Court of Appeals, and now in this Court, the plaintiff/petitioner has been Rachel L. Clay.

Before the Council's hearing examiner, Erias S. Human, Esquire, the moving party was the Secretary to the Council, Russell Smith. Ultimately, David A. Clarke, then as now, Chairman of the Council of the District of Columbia, rendered the final initial agency decision. The Council of the District of Columbia, through its general counsel's office, prosecuted the matter before the Office of Employee Appeals and its hearing examiners. In the Superior Court of the District of Columbia, counsel for the Council was replaced by the Corporation Counsel, D.C. The propriety of this representation and of the Council as not being, pursuant to District of Columbia law, a suable party in the context of this case, were raised but not resolved by the courts below. In the Court below, the District of Columbia Court of Appeals, the Corporation Counsel, D.C. represented the Council of the District of Columbia.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rachel L. Clay respectfully requests that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered on October 31, 1996, in Council of the District of Columbia, Appellant, v. Rachel L. Clay, Appellee.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is unpublished. It is reprinted in the appendices herein, p. 1a *infra*.

The Order of the Superior Court of the District of Columbia, issued June 22, 1995, is unpublished. It is reprinted in the appendices herein, p. 24a *infra*.

The Opinion and Order on Petition for Review of the District of Columbia Office of Employee Appeals, issued on June 18, 1993, is unpublished. It is reprinted in the appendices herein, p. 26a *infra*.

JURISDICTION

On May 3, 1984, petitioner Rachel L. Clay filed with the Chairman of the Council

of the District of Columbia her grievance alleging, *inter alia*, that her April 5, 1984, personnel Form 1 had effected an unlawful reclassification of her position from one with job protection to one subject to the political whim of the Councilmembers.

On July 3, 1986, a Council hearing examiner recommended to the Chairman of the Council that the petitioner receive job protection in her position.

On January 9, 1987, the Chairman rejected the advice of the hearing examiner and determined that the petitioner, Ms. Clay, had been properly classified without job protection.

On January 27, 1987, Ms. Clay appealed the Chairman's decision to the District of Columbia Office of Employee Appeals, an administrative agency charged with implementing the city's personnel system for non-union employees.

On July 9, 1992, an OEA administrative judge issued an "initial decision" in favor of Ms. Clay.

On June 18, 1993, the OEA issued its final decision sustaining in significant part the initial decision of the administrative judge.

On June 25, 1995, the Superior Court of the District of Columbia sustained the OEA decision.

On October 31, 1996, the District of Columbia Court of Appeals reversed the order of the Superior Court of the District of Columbia and remanded the matter to the Office of Employee Appeals for further review.

Pursuant to 28 U.S.C. § 1257(1), the petitioner seeks a writ of certiorari from this Court to review the judgment of the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the Constitution of the United States provides in pertinent part:

*****

Section 7.

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> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his

Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives my be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take

Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power — ....

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be,

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The District of Columbia Self-Government and Governmental Reorganization Act of 1973 ("Home Rule Act") provides in pertinent part:

D.C. CODE ANN. § 1-227 (1992 Repl. Vol.). Powers [Charter Provision].

(a) Subject to the limitations specified in §§ 1-206, 1-207, 1-233,

and 47-313, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. In addition, except as otherwise proved in this Act, all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan No. 3 of 1967, shall be carried out by the Council in accordance with the provisions of this Act.

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(e) An act passed by the Council shall be presented by the Chairman of the Council to the Mayor, who shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after the act is presented to him, either approve or disapprove such act. If the Mayor shall approve such act, he shall indicate the same by affixing his signature thereto, and such act shall become law subject to the provisions of § 1-233(c). If the Mayor shall disapprove such act, he shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after it is presented to him, return such act to the Council setting forth in writing his reasons for such disapproval. If any act so

passed shall not be returned to the Council by the Mayor within 10 calendar days after it shall have been presented to him, the Mayor shall be deemed to have approved it, and such act shall become law subject to the provisions of § 1-233(c) unless the Council by a recess of 10 days or more prevents its return, in which case it shall not become law. If, within 30 calendar days after an act has been timely returned by the Mayor to the Council with his disapproval, two-thirds of the members of the Council present and voting vote to reenact such act, the act so reenacted shall become law subject to the provisions of § 1-233(c).

D.C. CODE ANN. § 1-233 (1992 Repl. Vol.). Limitations [Upon Authority of Council of the District of Columbia].

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(c)(1) Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-229(a), should take effect immediately because of emergency circumstances, and acts

proposing amendments to title IV of this Act and except as provided in § 47-322(c) and § 47-328(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has be ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2), such act shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into

law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law, subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-207, except subsections (d), (e), and (f) of such section, shall apply with respect to any joint resolution disapproving any act pursuant to this paragraph.

D.C. CODE ANN. § 1-242 (1992 Repl. Vol., Supp. 1995). Powers and duties [of Mayor][Charter Provision].

(1) The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District government. In addition, except as otherwise provided in this Act, all functions granted to or vested in the Commissioner of the District of Columbia, as established under Reorganization Plan No. 3 of 1967, shall be carried out by the Mayor in accordance with this Act. The Mayor shall be responsible for the proper

execution of all laws relating to the District, and for the proper administration of the affairs of the District coming under his jurisdiction or control, including but not limiited to the following powers, duties, and functions:

*****

(3) The Mayor shall administer the personnel functions of the District covering employees of all District departments, boards, commissions, offices and agencies, except as otherwise provided by this Act. Personnel legislation enacted by Congress prior to or after January 2, 1975, including, without limitation, legislation relating to appointments, promotions, discipline, separations, pay, unemployment compensation, health, disability and death benefits, leave, retirement, insurance, and veterans' preference applicable to employees of the District government as set forth in § 1-213(c), shall continue to be applicable until such time as the Council shall, pursuant to this section, provide for coverage under a District government merit system. The District government merit system shall be established by act of the Council. The system may provide for

continued participation in all or part of the Federal Civil Service System and shall provide for persons employed by the District government immediately preceding the effective date of such system personnel benefits, including but not limited to pay, tenure, leave, residence, retirement, health and life insurance, and employee disability and death benefits, all at least equal to those provided by legislation enacted by Congress, or regulation adopted pursuant thereto, and applicable to such officers and employees immediately prior to the effective date of the system established pursuant to this Act, *except that nothing in this Act shall prohibit the District from separating an officer or employee subject to such system pursuant to procedures established by the Council for the separation of officers and employees whose positions are determined to be excess positions if the separation of such officer or employee is carried out during the 18-month period that begins on the date of the enactment of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 Emergency Amendment Act of 1991, and except that nothing in this section shall prohibit the District from paying an*

employee overtime pay in accordance with section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207). The District government merit system shall take effect not earlier than 1 year nor later than 5 years after January 2, 1975;

(Emphasis supplied to identify an amendment to the Home Rule Act on August 17, 1991, subsequent to action at issue in this litigation and not relevant thereto.)

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The CMPA provides in pertinent part:

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D.C. CODE ANN. § 1-602.4 (1992 Repl. Vol.). Status of employees employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-637.1; retention of existing rights.

(a) Persons employed by the District of Columbia government serving on the date that this chapter becomes effective, as provided in § 1-637.1, shall be guaranteed rights and benefits at least equal to those currently applicable to such persons

under provisions of personnel law and rules and regulations in force on the date immediately prior to the date that this chapter becomes effective as provided in § 1-637.1.

(b) All provisions of existing contracts between the District government and labor organizations shall be honored until their expiration.

(c) On January 1, 1980, all persons employed by the District of Columbia government, including those persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-637.1, shall automatically transfer into the appropriate personnel system as established pursuant to subchapters VIII and IX of this chapter or § 1-610.4 or 1-610.9. The classification of and compensation for the position assumed upon transfer, and the rights and benefits inhering in such position, shall be at least equal to the classification, compensation, rights and benefits associated with the position from which said employee is transferred. The rights and benefits protected under this subsection shall be only those applicable to said employees under the provisions of personnel laws and rules and regulations in force on

December 31, 1979: Provided, however, that no employee covered under the provision of this subsection shall be reduced in pay except as provided in subchapter XXV of this chapter.

(d) After January 1, 1980, persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-637.1 and who transfer into the appropriate personnel system, pursuant to subsection (c) of this section, shall be governed by the provisions of this chapter, with the exception of subsection (e) of § 1-608.1 and subsection (d) of § 1-609.1.

(e) Employees hired on or after the date that this chapter becomes effective as provided in § 1-637.1 shall be governed by all the provisions of this chapter without exception.

D.C. CODE ANN. § 1-602.5 (1992 Repl. Vol.). Development of new personnel system.

In accordance with the provisions of § 1-602.4, the Mayor and each personnel authority shall cause the development of unified systems for all employees of the District of Columbia government. Each employee of the District of Columbia

government employed on December 31, 1979, shall be guaranteed no reduction of current pay and benefits except as provided in subchapter XXV of this chapter.

STATEMENT OF THE CASE

In January, 1964, the petitioner, Rachel L. Clay, was hired as a clerk typist (GS-3) by the District of Columbia Department of Public Welfare. On January 20, 1967, she was awarded Career Tenure status (this award was actually issued in September 1969, but made retroactive to the date shown). She thereafter held other positions with the Executive Branch of the District of Columbia Government in which she continued to enjoy her job protection.

On March 19, 1972, Ms. Clay transferred to a position as an Administrative Aide with the City Council of the District of Columbia, established as an appointed local legislature by President Lyndon B. Johnson in Reorganization Plan No. 3 of 1967. Correspondence between the United States Civil Service Commission and the local District officials confirmed that Ms. Clay's position would not be one of the few that were determined to be political in nature without job protection. She held a position in the *old* Excepted Service.

Thereafter, the nature of the local

government in the District of Columbia changed upon the enactment of the District of Columbia Self-Government and Government Reorganization Act of 1973, signed by President Richard M. Nixon on December 24, 1973. Ms. Clay continued to be employed by the newly-established Council of the District of Columbia elected body.

Subsequently, pursuant to Section 422(3) of the Home Rule Act (D.C. CODE ANN. § 1-242(3)), the Council and the Mayor enacted the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA) which took effect on scattered dates in 1979 and 1980. Again, Ms. Clay was treated by Council personnel as having job protection. With biannual changes in the political membership of the Council dependent upon the action of the electorate, employees determined to be political in nature received letters of involuntary termination. Under the first two Council administrations, Ms. Clay never received such a letter.

On April 3, 1984, Ms. Clay learned for the first time that her supervisor at the Council believed that she had no job protection and that she could be fired at whim.

Thus, began the arduous process lasting over a period of 12 1/2 years which has been described in the Jurisdiction

Section of this petition.

Ms. Clay retained her job during the initial administration of David A. Clarke due to her outstanding work performance. Upon the election of the late John A. Wilson as Chairman, Ms. Clay was notified that she was to leave her position.

Ms. Clay subsequently found employment within the federal government. The federal agency credited her service with the District of Columbia government as having been with job protection, notwithstanding the recent action by the District officials. Subsequently, she retired from government service.

Ms. Clay seeks reinstatement with back pay and lost benefits to her former position with the Council of the District of Columbia.

THE WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE GRAVE CONSTITUTIONAL DEFECTS IN THE LEGISLATIVE AUTHORITY OF THE DISTRICT OF COLUMBIA, TO CORRECT AN ERRONEOUS INTERPRETATION OF AN ACT OF CONGRESS, AND TO CORRECT THE FUNDAMENTAL DENIAL OF PROCEDURAL DUE PROCESS OWED TO THE PETITIONER.

A. Introduction

After sixteen and one-half years of

litigation, the District of Columbia Court of Appeals, the highest "state" court in the District of Columbia since the enactment in 1970 of the District of Columbia Court Reform and Reorganization Act, determined as a matter of *state law* that the District administrative agency charged with interpretation of the city's personnel act, had, as a matter of law, misinterpreted the CMPA. The Court then remanded the matter to the same administrative agency, the Office of Employee Appeals, for further proceedings.

Of course, the District of Columbia Court of Appeals has the final say on the meaning of local laws of the District of Columbia. The interpretation of the CMPA made by the Office of Employee Appeals and rejected by the Court of Appeals is not before the Court. The Court of Appeals did not consider any other argument made by the petitioner herein in support of her claim, believing that "[it] can only affirm an administrative agency's decision for the reasons given by the administrative agency." *District of Columbia Metro. Police Dep't. v. Perry*, 638 A.2d 1138, 1146 n.23 (D.C. 1994). The Court then remanded this matter to the OEA for further proceedings. (Slip Opinion at 2, n.2, Appendix page 2a).

The petitioner has sought review in this Court because the gravamen of this

cause at this juncture is the constitutionality of both the CMPA and the Home Rule Act. The OEA, thus, lacks any authority to judge the constitutionality of its own governing statute. (*Cf. Doe v. Martin*, 404 F. Supp. 573 (D.D.C. 1975) (Three-Judge Court) suggesting that in an unusual circumstance that another District agency might be able to render a constitutional decision with regard to certain procedures of that agency.)

The District of Columbia Court of Appeals declined to hear any constitutional issue or further interpret the provisions of the Home Rule Act concerning personnel benefits. (See Slip Opinion at 17 n. 16, Appendix page 22a)

The Court suggested in *dicta* that the issue of the constitutionality of the CMPA and the Home Rule Act may not have been raised. Contrary to the view of the Court of Appeals, the petitioner on November 12, 1991, filed with the Office of Employee Appeals her Suggestion of Unconstitutionality of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, Appendix p. 48a. The Office of Employee Appeals and the Superior Court of the District of Columbia had no occasion to consider this matter, given their statutory analysis in favor of

the petitioner. The Court of Appeals's resolution of the CMPA statutory issue now compels analysis of the federal and District statutes in light of the Constitution.

The Office of Employee Appeals is without authority to test these constitutional issues and the Court of Appeals's remand to that agency rather than the trial court (see Slip Opinion at 16, n. 15, Appendix page 22a) precludes a forum which is competent to interpret Acts of Congress and the United States Constitution. The holding of *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156 (1973) is in accord.

B. Is the enactment of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. CODE ANN. § 1-601.1 *et seq.*) (locally known as and hereinafter referred to as the "CMPA") by the Council of the District of Columbia (D.C. City Council) and the Mayor of the District of Columbia, without any approval by the Congress or the President of the United States, an unconstitutional exercise of power in violation of the Bicameralism and Presentment Clauses when the CMPA amends 98 Acts of Congress and supersedes 73 Acts of Congress, all of which operate to deny to the petitioner her right to job protection and termination only for cause?

The CMPA was adopted by the Council of the District of Columbia after massive hearings and investigations. See Council of the District of Columbia, Report of the Committee on Government Operations, Bill No. 2-10, District of Columbia Government Comprehensive Merit Personnel Act of 1978, July 5, 1978, *reprinted in* House of Representatives, Committee on the District of Columbia Government Comprehensive Merit Personnel Act August 1978, 96th Cong. 1st Sess. (1979) The CMPA amended 98 Acts of Congress and superseded 73 provisions of federal law.

Given this Court's understanding of the legislative process set forth in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) that amendments to Acts of Congress must be accomplished with the same solemnity as their enactment—that is by the concurrence of both Houses of Congress by affirmative vote (the Bicameralism requirement) and the review by the President (the Presentment requirement)—it requires no further comment than this to show that the power required by our Constitution cannot be given to the nine elected members of the District's city council and the Mayor of the District of Columbia. Such an unlawful delegation of constitutional authority to local officials in the Nation's Capital is a far graver constitutional defect than any uncovered in *Chadha* or the plethora of

federal cases thereafter.

The effect of this unconstitutional enactment by the local District government, given its construction by the Court of Appeals, has denied the petitioner, Rachel L. Clay, a valuable right, namely her job with its concomitant benefits and retirement vested rights.

C. Are the provisions of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (D.C. CODE ANN. §§ 1-227(e), -233(c), & -242(3)) (hereafter referred to as the "Hom Rule Act") which directed and authorized the Council of the District of Columbia to adopt the CMPA an unconstitutional exercise of power in violation of the Bicameralism and Presentment Clauses, as interpreted by this Court in *Immigration and Naturalization Service v. Chadha* because the District of Columbia City Council enactment of the CMPA, which was mandated by the Home Rule Act, which amended and superseded myriad Acts of the Congress without Congressional and Presidential approval all operated to deny to the petitioner her right to job protection and termination only for cause?

In the wake of the *Chadha* decision, the District of Columbia Court of Appeals held that the principles of *Chadha* applied to the District of Columbia-Federal

Government relationship. Thus, *Gary v. United States*, 499 A.2d 815 (D.C. 1985) (en banc), cert. denied 475 U.S. 1086 (1986) and *McClough v. United States*, 520 A.2d 285 (D.C. 1987) sustained *Chadha*'s application to the District. The Court was clear to reject any special reliance upon cases interpreting the District Clause in Article I, Section 8 of the Constitution. These cases all held that the Congress could create special relationships with the District. But none of these decisions even hinted at the constitutional nightmare created in the Home Rule Act. *See, generally, District of Columbia v. John R. Thompson, Co.*, 346 U.S. 100, 109 (1953); *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889); *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1 (1889) (all discussing relationship of Congress and the District of Columbia and *all* decided prior to *Chadha*).

In an effort to correct the deficiencies in the Home Rule Act following *Chadha*, the Congress on October 12, 1984, in Pub. L. 98-473, amended several key provisions relating to the legislative veto mechanism. Thus, the ability of one or two Houses of the Congress (mechanism differed depending upon which provisions of the D.C. CODE ANN. were being amended by the Council) was amended to require an affirmative Act of Congress with Presentment to the President to reject the

Council's actions.

However, this legislative effort did not address the more fundamental defect: that of the Council to amend directly Acts of Congress with no congressional or presidential involvement. The law thus remains constitutionally flawed.

The effect of this unconstitutional enactment by the local District government, given its construction by the Court of Appeals, has denied the petitioner, Rachel L. Clay, a valuable right, namely her job with its concomitant benefits and retirement vested rights.

The manner in which the authority of the District of Columbia may be corrected to adopt laws of general application may be seen in laws relevant to Guam, the Virgin Islands, and the Commonwealth of Puerto Rico. *See* 48 U.S.C. §§ 1421(c), 1423(i); -1574, -1575 (West 1987); and *compare* §§ 811-45 (West 1952) *with* 811-20 (West 1987); *see also* French, *Can Home Rule in the District of Columbia Survive the Chadha Decision?*, 33 CATH. U. L. REV. 811, 850-51 and accompanying notes (1984)

D. Is the interpretation by the District of Columbia Court of Appeals of the nature of the petitioner's personnel rights under the Home Rule Act erroneous in that the Court's decision denied her rights

to which she was previously entitled?

Should this Court determine that it does not wish to review the constitutional arguments set forth in Points B and C above, the proper interpretation of the provisions of the federal law, the Home Rule Act must be considered.

D.C. CODE ANN. § 1-242(3) (1992 Repl. Vol., Supp. 1995) provides in pertinent part:

> The system may provide for continued participation in all or part of the Federal Civil Service System and shall provide for persons employed by the District government immediately preceding the effective date of such system personnel benefits, including but not limited to pay, tenure, leave, residence, retirement, health and life insurance, and employees disability and death benefits, all at least equal to those provided by legislation enacted by Congress, or regulation adopted pursuant thereto, and applicable to such officers and employees immediately prior to the effective date of the system established pursuant to this Act....

The question presented then is the meaning of the equivalency of benefits

clause - "all at least equal to those provided...to such officers and employees immediately prior to the effective date [of the CMPA]". This matter has been considered by the Court of Appeals in *American Federation of Government Employees v. Barry*, 459 A.2d 1045 (D.C. 1983). There, the Court of Appeals determined that a pay raise for District employees which was less than the federal pay raise for that year did not violate the provision of the Home Rule Act excerpted above.

This strained reading of the natural rendering of the language in this section compels the conclusion that the petitioner, Rachel L. Clay, had the benefit to which she was entitled in the pre-CMPA systems. Even should this Court determine that *AFGE* was correctly decided, it cannot be said to have any impact upon tenure rights—such as the petitioner's herein—which are set forth specifically in the Home Rule Act.

E. Is the establishment of a local presidentially appointed Mayor-Council form of government for the District of Columbia by Reorganization Plan No. 3 of 1967 an unconstitutional exercise of power in light of *Chadha*, or, in the alternative, does the adoption of Pub. L. 98-532 cure the constitutional defect of reorganization plans and thus the District of Columbia Court of Appeals decision in *dicta* that the petitioner had no job protection and could

be fired at whim was an erroneous interpretation of the protections that the petitioner enjoyed under the pre-Home Rule form of government?

The immediate predecessor to the elected Council under the Home Rule Act was the appointed city council-mayor form of government that President Lyndon B. Johnson established in Reorganization Plan No. 3 of 1967 to replace the three-member Commission form of government in the District of Columbia. *See* 32 Fed. Reg. 11,669 (1967).

The Commissioners of the District of Columbia had entered into a Joint Agreement in 1930 with the United States Civil Service Commission to assist the District in its personnel functions. This agreement was memorialized as Executive Order 5491, signed by President Herbert Hoover on November 18, 1930. From this executive agreement various types of personnel systems emerged. Ms. Clay enjoyed job protection from as early as 1964, while employed by the District government under the Commission form of government.

When she transferred in 1972 to work with the appointed city council, an exchange of correspondence between the appointed city council's staff and the U.S. Civil Service Commission had preceded her. Several, perhaps two or three, positions with the new appointed city council were

deemed to be political in nature without job protection. All others would continue under preexisting personnel systems—in the case of the petitioner herein, one with job protection and termination only for cause. Thus, whether under the pre-appointed city council or under the appointed city council, Ms. Clay enjoyed job protection.

A strong argument may be made that Reorganization Plan No. 3 of 1967 is invalid under *Chadha* analysis. In response to the *Chadha* decision the Congress thereafter enacted Pub. L. 98-532 which purported to cure and make lawful all "suspect" reorganization plans. (The plans were suspect because of the then existing provisions which allowed a legislative veto to be used by either House of Congress to reject the plan, thus allowing the rewriting of federal law by indirection and no affirmative vote of both Houses with concurrence or veto and override by the President.)

Thus, whether as a matter of interpretation of federal law before the Reorganization Plan or thereafter, this question presents an important issue of the meaning of federal personnel law.

F. Does the remand by the District of Columbia Court of Appeals to the District of Columbia Office of Employee Appeals in the instant case, when

considered in light of the petitioner's initial personnel grievance which was filed on May 3, 1984—over 12 1/2 years ago—constitute a denial of procedural due process?

The Court of Appeals has remanded this matter to the Office of Employee Appeals for further consideration. The limited ability of the OEA to resolve the instant issue has been set forth above.

It is a denial of fundamental procedural due process, after 12 1/2 years, to make the petitioner, Rachel L. Clay, return to the very agency whose legal analysis the District of Columbia Court of Appeals has rejected.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) requires a hearing at a meaningful time and in a meaningful manner. *FDIC v. Mallen*, 486 U.S. 230, 240 (1988) is in accord.

Additional cases from the District of Columbia federal courts attempt to set some parameters on delay in decision-making. *Air Line Pilots Ass'n. Int'l. v. CAB*, 750 F.2d 81 (D.C. Cir. 1984) (5-year delay unreasonable); *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (8-year delay unreasonable); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (4-year delay

unreasonable). None of them remotely approach this 12 1/2 year case which is about, given the Court of Appeals' order, to begin again. The petitioner should live to obtain the benefit of this litigation, rather than to have any benefit become the legacy she leaves to her children.

G. Summary

In order to grant to Ms. Clay the rights to her job and her related benefits and retirement, the writ of certiorari must be issued for any one of the reasons set forth above.

CONCLUSION

For the foregoing reasons, the petitioner requests that a writ of certiorari issue to the District of Columbia Court of Appeals to provide relief sought by the petitioner.

Respectfully submitted,

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District of Columbia Court of Appeals

No. 95-CV-1062

COUNCIL OF THE DISTRICT OF COLUMBIA,
APPELLANT,

v.

RACHEL L. CLAY, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. Joan Zeldon, Trial Judge)

(Argued June 24, 1996
Decided October 31, 1996)

Edward E. Schwab, Assistant Corporation Counsel, with whom *Charles F.C. Ruff*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellant.

Bruce Comly French for appellee.

Before WAGNER, *Chief Judge*, and SCHWELB and REID, *Associate Judges*.

SCHWELB, *Associate Judge*: The principal question in this case is whether appellee Rachel L. Clay, who was the Director of the Legislative Services Division of the Council of the District of Columbia, a DS-13 position,[1] until her

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[1] The grades of District of Columbia employees are preceded by the abbreviation DS. The
(Footnote continued on next page)

termination in 1990, was a member of the Career Service who could be discharged only for cause. We hold that she was not.

I.

PRIOR PROCEEDINGS

The District of Columbia appeals from an order of the Superior Court which affirmed a decision of the Office of Employee Appeals (OEA) adverse to the District. The challenged OEA decision ordered Ms. Clay's reinstatement to her former position on the ground that she had been unlawfully terminated without cause. The case, as we see it, turns on whether Ms. Clay was in the Excepted Service, from which termination without cause is permitted, or in the Career Service, from which such termination is proscribed.[2]

(Footnote continued from preceding page)

corresponding abbreviation for federal employees is GS.

[2] Ms. Clay contends in this court, *inter alia*, that she was protected from termination without cause even if she was in the Excepted Service. The OEA's decision in Ms. Clay's favor was not based on that ground. We have held that "this court can only affirm an administrative agency's decision for the reasons given by the administrative agency." *District of Columbia Metro. Police Dep't v. Perry*, 638 A.2d 1138, 1146 n.23 (D.C. 1994) (citations omitted). We therefore leave to the OEA's consideration on remand those of Ms. Clay's contentions which the OEA did not address in its final decision of June 18, 1993. The OEA must also determine whether

(Footnote continued on next page)

Ms. Clay began her career with the Council on March 19, 1972 as an Administrative Aide (GS-7).[3] During the years that followed, she received several promotions and grade increases. All of the "Form 1" personnel action forms appointing her to a new position expressly stated that the position was in the Excepted Service. The "remarks" section of each personnel action form contained the following statement:

> As a member of the D.C. Council Staff, Appointee serves at the will of the appointing authority and this appointment is subject to termination at the pleasure of the Council.

Ms. Clay received her final grade increase on January 29, 1978. On that date, she was promoted from Legislative Services Specialist (GS-11) to the position of Director of Legislative Services. Ms. Clay's formal job title in her new position remained Legislative

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any such contentions were raised in timely fashion and adequately preserved.

[3] Ms. Clay worked in a number of government positions before joining the Council. In January 1964, she was hired as a clerk typist (GS-3) for the Department of Public Welfare (DPW). While at the DPW, Ms. Clay was promoted several times, and in September 1969, her status was converted to "Career Tenure," retroactive to January 20, 1967. Ms. Clay was transferred in October 1969 to the position of Administrative Aide in the Office of Personnel (GS-6).

Services Specialist, but her new grade was GS-13. On April 5, 1984, Ms. Clay's title was changed to Supervisory Legislative Services Specialist (DS-13), but her duties remained the same. Once again, the Form 1 for Ms. Clay's new position reiterated that her employment could be terminated at the pleasure of the Council.

On May 3, 1984, Ms. Clay filed a grievance under the Council's adverse action and grievance procedures, which are published at 29 D.C. Reg. 874 (1982). She asserted that the April 5, 1984 Form 1 improperly effected a change in her status from the Career Service to the Excepted Service. She argued that she had become a member of the Career Service on January 2, 1980, the effective date of the Comprehensive Merit Personnel Act (CMPA), D.C. Code §§ 1-601 *et seq.* (1992).[4] She relied on D.C. Code § 1-602.4 (c), which provides, in pertinent part, as follows:

> On January 1, 1980, all persons employed by the District of Columbia government, including those persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-637.1, shall automatically transfer into the appropriate personnel system as established pursuant to subchapters VIII [Career Service] and IX [Educational Service] of this chapter or § 1-610.4 [special

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[4] Unless otherwise stated, all references in this opinion to the District of Columbia Code are to the 1992 replacement edition.

> appointments] or 1-610.9 [attorneys]. The classification of and compensation for the position assumed upon transfer, and the rights and benefits inhering in such position, shall be at least equal to the classification, compensation, rights and benefits associated with the position from which said employee is transferred. The rights and benefits protected under this subsection shall be only those applicable to said employees under the provisions of personnel laws and rules and regulations in force on December 31, 1979: Provided, however, that no employee covered under the provisions of this subsection shall be reduced in pay except as provided in subchapter XXV of this chapter.

Ms. Clay argued that all excepted District employees who were not educational service employees, special appointees, or attorneys automatically became career employees on January 1, 1980.

On January 9, 1987, after protracted proceedings, the Chairman of the Council, David A. Clarke, issued a final decision denying Ms. Clay's grievance.[5] The

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[5] The Council had previously appointed a hearing examiner to consider the case and to advise the Chairman. On July 3, 1986, in a non-binding recommendation to the Chairman, the hearing examiner concluded that Ms. Clay's position was in the Excepted Service. The examiner recommended, however, that an exception be made for Ms. Clay and that a new Form 1 be issued

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chairman concluded that Ms. Clay's position had been correctly classified as falling within the Excepted Service. The chairman relied, in substantial part, on two sections of the CMPA which he viewed as relevant to Ms. Clay's grievance. The first of these provisions, D.C. Code § 1-610.3 (a)(3), reads as follows:

> (a) Under qualifications issued pursuant to § 1-610.1, each appropriate personnel authority may appoint persons to the Excepted Service as follows:
>
> > (3) *All employees of the Council of the District of Columbia, except those permanent technical and clerical employees* appointed by the Secretary or General Counsel....

(Emphasis added). The second statute cited by Mr. Clarke, D.C. Code § 1-610.7, provides, in pertinent part:

(Footnote continued from preceding page)

which would award her "Career Status — Incumbent Only." Chairman Clarke described the recommendation that Ms. Clay be reclassified as "very inviting," but he concluded that he had "no right or authority" to adopt it, because "an elected official's designation of a person as career-service when that person is really in an excepted-service position, based on the appointing official's appreciation of his [or] her work, would fly in the face of what the excepted service is all about."

> Persons holding appointments in the District of Columbia government, paid from appropriations made to the Council of the District of Columbia *and classified as a GS-10 or less* under § 5332 of Title 5 of the United States Code and whose position would not be in the Excepted Service under the provisions of this subchapter on January 1, 1980, *shall be appointed to the Career Service* created in subchapter VIII of this chapter, if such incumbent is found to possess the minimal qualifications for the position to which he or she is appointed.

(Emphasis added). The chairman construed these provisions to mean that employees who were GS-11 and above (including Ms. Clay) remained in the Excepted Service following the effective date of the CMPA.[6]

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[6] In his decision, the chairman described Ms. Clay's duties in considerable detail. He found that Ms. Clay

> exercis[ed] a wide range of judgment in planning and conducting the work of the unit. She develop[ed] systems and establish[ed] policies and procedures to track, control, and process the flow of legislative measures before the D.C. Council.... This [work] includ[ed], but [was] not limited to, developing, implementing, evaluating and adjusting policies and procedures for the efficient and effective identification, retrieval, publication, and transmittal of a wide range of legislative information....[Ms. Clay] was delegated wide latitude for the

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On January 27, 1987, Ms. Clay appealed to the OEA from Chairman Clarke's decision. On November 26, 1990, while her OEA appeal was pending, Ms. Clay received a notice of separation effective December 31, 1990. She was advised that she was being terminated "as a result of the change within the Council of its elected Chairman." On January 14, 1991, Ms. Clay moved to amend her petition to the OEA to include a challenge to the authority of the Council to discharge her without cause. The OEA granted Ms. Clay's motion, and the legality of her termination is therefore properly before us.

On July 9, 1992, an OEA Administrative Judge issued an "initial decision" in favor of Ms. Clay. He concluded that, on January 1, 1980, Ms. Clay was automatically transferred from the Excepted Service to the Career Service

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> exercise of independent judgment in resolving internal administrative problems and legislative inquiries referred to the Council....She assisted the Secretary in rendering advice to Council Members and staff regarding the adequate documentation and publication of Council business....[Ms. Clay also] represented the Council and [the] Secretary in negotiations and administration of contracts. She provided advice in areas of planning....[and] was confronted with substantial planning problems.

(Internal quotation marks omitted). The Chairman therefore concluded that Ms. Clay's duties were "far more than 'clerical and technical.'"

by virtue of D.C. Code Section 1-602.4 (c). The Administrative Judge found that Ms. Clay had occupied several "Excepted" positions under the federal classification system, but nevertheless concluded that

> the CMPA created a personnel system for D.C. Government employees separate and distinct from the federal civil service system of which the District had been a part. Therefore, by operation of law, on January 1, 1980 all employees of the D.C. government automatically transferred into either the Career Service, the Educational Service, or those positions established pursuant to [Sections] 1-610.4 and 1-610.9. *See* D.C. Code Ann. § 1-602.4 (c) (1987). This automatic transfer is further evidenced by the provisions of D.C. Code Ann. § 1-608.1 (a) (1987) and DCOP Rule § 201.1.
>
> In the instant matter, it is clear that Employee did not transfer into the Educational Service or into any of the "Special Appointments" set forth in [Section] 1-610.4 of the CODE [sic]. Further, since Employee is not an attorney, she did not transfer pursuant to [Section] 1-610.9 of the Code. Thus, I conclude that on January 1, 1980, Employee automatically became a member of the Career Service.

On June 18, 1993, the OEA issued a final decision denying the Council's petition for review. The OEA, agreeing in large measure with the Administrative

Judge, accepted Ms. Clay's interpretation of Section 1-602.4 (c). The OEA also held that the other provisions of the CMPA on which Chairman Clarke had relied—Sections 1-610.7 and 610.3 (a)(3)— did not conclusively support the Council's position.

On June 23, 1995, a judge of the Superior Court upheld the OEA's decision in a brief order which reads, in pertinent part, as follows:

> While the court finds that the relevant provisions of the Comprehensive Merit Personnel Act, including D.C. Code §§ 1-602.4 (a), 1-610.3, and 1-610.7, are not models of clarity, the court cannot conclude that the Office of Employee Appeals' Opinion and Order of June 18, 1993 was 'clearly erroneous as a matter of law.' See Super. Ct. Agency Review Rule 1 (g)(1995).

The Council filed a timely appeal.

II.

LEGAL DISCUSSION

A. The Standard of Review.

The facts in this case are undisputed, and the question before us is one of law.[7] As we recently reiterated in

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[7] An appellate court, of course, reviews the trial court's legal conclusions "under the non-

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Harris v. Office of Worker's Compensation, 660 A.2d 404 (D.C. 1995),

> [o]ur review of the agency's legal rulings is *de novo*, for "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and the judiciary is the final authority on issues of statutory construction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Id. at 407. We accord considerable weight to the interpretation of a statute by the agency responsible for administering it, id.(citations omitted), but such deference is appropriate only "as long as that interpretation is reasonable and not plainly wrong or inconsistent with [the] legislative purpose." *Coumaris v. District of Columbia Alcoholic Beverage Control Bd.*, 660 A.2d 896, 899 (D.C. 1995) (citations omitted); *see generally Chevron, supra*, 467 U.S. at 842-45. We have also generally declined to defer to the administrative construction of a statute where the agency has failed to construe the ambiguous terms of that statute or to identify the question of construction being addressed. *Cf. Coumaris, supra*, 660 A.2d at 899; *see also*

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deferential *de novo* standard." *See, e.g., Griffin v. United States*, 618 A.2d 114, 117 (D.C. 1992)(citations omitted).

Zenian v. District of Columbia Office of Employee Appeals, 598 A.2d 1161, 1166 (D.C. 1991).[8]

B. The Language of Section 1-602.4(c).

The OEA's disposition of this case in Ms. Clay's favor was predicated on the proposition that, as of January 1, 1980, Ms. Clay was automatically transferred into the Career Service by operation of the CMPA. Specifically, the OEA relied on Section 1.602.4 (c), which we have quoted above at pp. 3-4, *supra*. The third sentence of that section, however, reads, in pertinent part, as follows:

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[8] "The deference which courts owe to agency interpretations of statutes which they administer is, of course, at its zenith where the administrative construction has been consistent and of long standing, and plummets substantially when these attributes are lacking." *Tenants of 738 Longfellow St., N.W. v. District of Columbia Rental Hous. Comm'n*, 575 A.2d 1205, 1213 (D.C. 1990) (citations omitted). The OEA's construction of the CMPA in this case is not of long standing, and the OEA cited none of its own precedents in support of the decision.

The Council also contends that the court should accord Chairman Clarke's decision some weight in construing the CMPA, notwithstanding the Council's status as a party to this litigation. Because we disagree with OEA's construction in any event, we need not decide whether the fact that the Chairman's statutory analysis differs from the OEA's should affect our standard of review.

> The rights and benefits protected under this subsection shall be *only those applicable to said employees under the provisions of personnel laws and rules and regulations in force on December 31, 1979....*

(Emphasis added). The foregoing sentence was unaccountable omitted from the OEA's statutory analysis. Indeed, the OEA quoted only the portion of the section which precedes this sentence.[9] The OEA thus analyzed the provision under consideration without giving any consideration to the language therein which deals most directly with the issue at hand.

Ms. Clay acknowledged before the OEA that, as of December 31, 1979, her GS-13 position was not in the federal Career Service. Because Section 1-602.4 (c), by its terms, conferred on her only those

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[9] The Administrative Judge likewise failed to address the third sentence of Section 1-602.4 (c). Similarly, counsel for Ms. Clay has not discussed it in any of his briefs. Indeed, Chairman Clarke noted in his decision, which was issued in 1987, that Ms. Clay's counsel, in quoting Section 1-602.4 (c), had "inadvertently I am sure" omitted four key italicized words: "*only those [rights and benefits] applicable to.*" Unfortunately, counsel left the same four words out of his brief to this court, filed on April 5, 1996. At oral argument, counsel effectively conceded that the language of the third sentence was contrary to his position, and he was understandably unable to offer an interpretation of the sentence that was not damaging to his cause.

protections to which she was entitled prior to January 1, 1980, and because Ms. Clay did not enjoy, in 1979, the right not to be terminated without cause, it follows that the enactment of Section 1-602.4 (c) did not invest her with such a right. Indeed, it the second and third sentences of the section are read together, then the only reasonable import of the entire provision is that the transferred employee receives all of the rights and benefits that he or she enjoyed in the federal service or in the pre-CMPA Career Service, but no additional rights or benefits.

C. Expressio Unius Est Exclusio Alterius.

Disregarding the critical third sentence of Section 1-602.4 (c), the OEA focused instead on the earlier language in that section, which provides that all District employees shall "automatically transfer into the appropriate personnel system...." The OEA noted that Section 1-602.4 (c) identifies three categories into which different employees would transfer:

1. the Career Service;

2. the Educational Service; and

3. the Excepted Service, in relation to which the statute mentions only attorneys or special appointees.

Ms. Clay had no connection with the Educational Service and was neither an attorney nor a special appointee. Accordingly, in the OEA's view, the Council must necessarily have intended that she transfer into the Career Service.

The Career Service, in other words, was viewed by the OEA as a catch-all category for anyone who did not fit into any other Service.

In support of this conclusion, the OEA invoked the venerable Latin maxim "*expressio unius est exclusio alterius,*" which means, in this context, that "when a legislature makes express mention of one thing, the exclusion of others is implied." *See, e.g., McRay v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986) (citation omitted). The OEA reasoned that, because the statute expressly provided that attorneys and special appointees were automatically transferred into the Excepted Service, other employees necessarily were not.

Latin maxims, however, will only take us so far. *See Edwards v. United States*, 583 A.2d 661, 664 (D.C. 1990). The *expressio unius* maxim, in particular, must be applied with a considerable measure of caution. *Cf. National Petroleum Refiners Ass'n v. FTC*, 157 U.S. App. D.C. 83, 87, 482 F.2d 672, 676 (1973), *cert. denied*, 415 U.S. 951 (1974). It is "an aid to construction, not a rule of law." *Neuberger v. C.I.R.*, 311 U.S. 83, 88 (1940). It must therefore be subordinated to "clear and contrary evidence of [legislative] intent." *Id.; see also In re Joseph B.*, 671 P.2d 852, 855 (Cal. 1983).

An argument predicated on *expressio unius* might perhaps be persuasive here if Section 1-602.4 (c) did not contain the critical third sentence, which explicitly

and unambiguously provides that the CMPA confers on an employee only those protections which he or she enjoyed before the CMPA's effective date. The inclusion of that sentence in the statute, however, makes it unreasonable to infer, on the basis of a permissive Latin maxim, that the Council intended, in enacting the CMPA, to require the automatic transfer of high-ranking and policy-making employees into the Career Service. The observations of Chairman Clarke in his written decision denying Ms. Clay's grievance are persuasive in this regard:

> [Ms. Clay] argues that [Section] 1-602.4 provides that all persons employed by the District of Columbia government on January 1, 1980, whether within the excepted service at that time or not, transferred to the career service. Such a reading would mean that any Council employee, in whatever office, who was employed anywhere in the District government on January 1, 1980, would be forever within the career service. Indeed, under this interpretation, any Councilmember's personal staffer who was on board on January 1, 1980 could claim career status and remain with that Councilmember or his [or] her successor against the member's will. I am positive that this was not the intent of the law.

D. Other Relevant CMPA Provisions.

Even if we were to assume, *arguendo*, that the third sentence of Section 1-602.4 (c) does not require the rejection of Ms.

Clay's claim, that section nevertheless must be viewed not in isolation, but together with other relevant provisions of the CMPA. *See, e.g., District of Columbia v. Morrissey*, 668 A.2d 792, 797 (D.C. 1995) (citations omitted). Our consideration of those sections of the Act which deal with the problem at hand, and which were relied upon by Chairman Clarke, reinforces our disagreement with the OEA's disposition of the case.

Section 1-610.3 (a)(3) provides that the appropriate personnel authority[10] may appoint to the Excepted Service "[a]ll employees of the Council of the District of Columbia, except those permanent technical and clerical employees appointed by the Secretary or General Counsel." Ms. Clay's position was more than that of a technical or clerical employee. On the contrary, she held important policy-making responsibilities. See note 6, *supra*. Section 1-610.3 (a)(3) thus contemplates that Ms. Clay and others in similar positions would be in the Excepted Service and not in the Career Service. Moreover, the regulations implementing the CMPA provide that all Council employees, except those who are in grade DS-10 or less and whose functions do not include "advocacy or policy," shall be in the Excepted Service.[11] Ms. Clay was not a lower grade

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[10] In this case, the appropriate personnel authority is the Chairman of the Council. *See* D.C. Code § 1-604.6 (b)(3).

[11] Section 904.9 of the D.C. Office of Personnel Regulations, 32 D.C. Reg. 2275 (1985), provides

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technical or clerical employee and does not fall within the exception for such employees which is recognized in the cited regulations.[12]

Section 1.610.7, quoted at page 5, *supra*, is also difficult to reconcile with Ms. Clay's position. That provision

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that "[p]ursuant to D.C. Code § 1-610.3 (a), policy positions shall consist of ...

> (c) Positions occupied by all employees of the Council of the District of Columbia, except those permanent technical and clerical employees appointed by the Secretary or General Counsel....

Section 904.10 provides:

> For the purposes of § 904.9 (c), in accordance with D.C. Code § 1-610.7 (1981), permanent technical and clerical employees shall mean personnel at a DS-10 grade or less whose responsibilities and duties require training or experience but whose functions do not include advocacy or policy.

Both of these quoted provisions are included in Part 9 of the regulations which deal with the Excepted Service.

[12] According to the OEA, the Council's reliance on Section 1-610.3 (a)(3) is unavailing because "there is no indication that the personnel authority for the Council ever appointed Employee to an Excepted Service position pursuant to [Section] 1-610.3 (a)(3)." In light of our construction of Section 1-602.4 (c), however, Ms Clay was automatically transferred into the Excepted Service, and no such "appointment" was necessary.

automatically transferred to the Career Service only those otherwise qualified District of Columbia employees who were "classified as a GS-10 or less" under the federal classification system. If Section 1-602.4 (c) had been intended to move into the Career Service government employees who, like Ms. Clay, held grades of GS-11 or above, then the language in Section 1-610.7, italicized above, would serve no purpose and would have no effect. We must be "especially mindful," in interpreting the CMPA as a whole, that "each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous." *Morrissey, supra*, 668 A.2d at 798 (quoting *Thomas v. District of Columbia Dep't of Employment Servs.*, 547 A.2d 1034, 1037 (D.C. 1988)). Moreover, canons of construction aside, it surely defies common sense to suggest that if the Council intended to ensure the automatic transfer to the Career Service of otherwise eligible employees regardless of grade, it would have written into the statute a transfer provision limited to those employees who were classified at GS-10 or less.[13]

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[13] According to the OEA, the Council "could have enacted [Section] 1-610.7 (which transfers into the Career Service those employees graded GS-10 and below) as a limitation on the appointment authority conferred in [Section] 1-610.3." We conclude that this reading of Section 1-610.7 is a strained one to say the least. Nothing in the statute or the regulations identifies Section 610.7 as effecting a restriction on the power of the "appropriate personnel authority" to

(Footnote continued on next page)

E. The Statute as a Whole.

Considered in isolation, each of the three sections of the CMPA which we have discussed above might conceivably be viewed as inconclusive with respect to Ms. Clay's status. Read together, however, they establish to our satisfaction that she was properly placed in the Excepted Service. Notwithstanding its somewhat perplexing focus on attorneys and special appointees, Section 1-602.4 (c) was intended to confer on transferred employees only those benefits and protections which they had enjoyed as federal or pre-CMPA employees. Sections 1-610.3 (a)(3) and 1-610.7, as well as the implementing regulations, persuade us that GS-13 employees of the Council holding policy making positions were never intended to become members of the Career Service.[14]

(Footnote continued from preceding page)

designate employees to the Excepted Service and the appointing authority is not placed on notice of any such purposed restriction. Indeed, Section 1-610.3 (a) authorizes the appointing authority to make appointments "under qualifications issued pursuant to [Section] 1-610.1," but makes no reference at all to Section 610.7.

[14] Ms. Clay relies on Section 1-610.2, denominated "Nature of positions in the Excepted Service and conversion rights." We agree with the following discussion of that section in Chairman Clarke's written decision:

(Footnote continued on next page)

(Footnote continued from preceding page)

> Petitioner also refers to [Section] 1-610.2 which describes the intent of the excepted service as applying to persons whose jobs are "of a policy determining, confidential, or policy advocacy character and who report directly to the head of an agency." It is clear from her position descriptions that her responsibilities include matters of policy. And, while it is correct that she reports to the Secretary of the Council and not to the Chairman, I view [Section] 1-610.2. If such were not the case, then employees within the office of each member of the Council and within each committee would be exempted from the excepted service because they do not report to the Chairman, and such would be clearly beyond the intent of the legislation.

Ms. Clay also cites Section 201.1 of the D.C. Office of Personnel Regulations, 27 D.C. Reg. 4343 (Oct. 3, 1980), which provides:

> Except as provided below, all D.C. Government employees serving in excepted or competitive service positions are transferred into the Career Service, established in Title VIII of the law.

None of the provisions "below" fits Ms. Clay's circumstances. Accordingly, if this regulation is read literally, then it appears to vindicate Ms. Clay's contention that she was transferred into the Career Service. If Section 201.1 is so construed, however, it runs directly afoul of the third sentence of Section 1-602.4 (c), for it purports to accord to transferred employees protections dramatically beyond those which they enjoyed in the federal service or in the pre-CMPA Career Service. A regulation out of harmony with the underlying statute is a "mere nullity."

(Footnote continued on next page)

III.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. The case is remanded to the OEA[15] for further

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(Footnote continued from preceding page)

Tenants of 738 Longfellow St., supra, 575 A.2d at 1213 (citations omitted). In any event, Section 904.9 of the Regulations, which is quoted at note 10, *supra*, and which deals specifically with Council employees, is irreconcilable with the notion that these employees as a group were automatically incorporated into the Career Service without regard to their duties or grade level.

15 We see no useful purpose in remanding first to the trial court so that that court may remand the case to the OEA.

proceedings consistent with this opinion.[16]

So ordered.

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16 Without specifically challenging the constitutionality of the CMPA, counsel for Ms. Clay asserts that it is "constitutionally suspect because it permits the Council to amend Congressional legislation without compliance with the Presentment and Bicameralism clause." This contention is without merit. *See* D.C. Code §§ 1-201 (a), -204; *see also Christianson v. King County*, 239 U.S. 356, 365 (1915); *Sprint Communications Co. v. Kelly*, 642 A.2d 106, 112 (D.C.), *cert. denied*, 115 S. Ct. 294 (1994); *Gary v. United States*, 499 A.2d 815 (D.C. 1985). Moreover, if the CMPA were unconstitutional, Ms. Clay would revert to her status at the time of its enactment, namely Director of Legislative Services (GS-13). That position, as the OEA recognized, was in the Excepted Service.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

COUNCIL OF THE DISTRICT OF COLUMBIA,

Petitioner,

v.

RACHEL CLAY,

Respondent.

Civil Action No.93-MPA-34
Calendar 5
Judge Zeldon

ORDER

The Court has carefully reviewed Petitioner's Brief in Support of Petition for Review of Decision of the Office of Employee Appeals, Respondent's Opposition thereto, and the entire record herein. While the Court finds that the relevant provisions of the Comprehensive Merit Personnel Act, including D.C. Code §§ 1-602.4(c), 1-610.3, and 1-610.7, are not models of clarity, the Court cannot conclude that the Office of Employee Appeals' Opinion and Order of June 18, 1993 was "clearly erroneous as a matter of law." *See* Super. Ct. Agency Review Rule 1(g) (1995).

WHEREFORE, it is this 22nd day of June, 1995,

ORDERED, that the Office of Employee Appeals' Opinion and Order is hereby **affirmed**.

/s/
Joan Zeldon
Associate Judge
(Signed in Chambers)

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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the matter of:

Rachel L. Clay
Employee

v.

Council of the District of Columbia
Agency

OEA Matter No. 1602-0045-87
Date of Issuance: June 18, 1993

OPINION AND ORDER
ON
PETITION FOR REVIEW

On March 19, 1972, Agency hired Employee as an Administrative Aide, GS-7. Relying on the Joint Regulations between the District government and the United States Civil Service Commission, Agency placed Employee's position in the Excepted Service.[1] However, on February 13, 1975,

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[1] Pursuant to Executive Order No. 5491, issued November 18, 1930, the Commissioners of the District of Columbia and the United States Civil Service Commission (CSC) promulgated joint regulations governing appointments in the District government. Under these regulations, the D.C. Commissioners and the CSC agreed that appointments to positions within the District government would be subject to the law and rules governing the federal Civil Service. The only method for amending the joint regulations was by joint agreement of the D.C. Commissioners and the CSC. See Paragraph 17 of the joint regulations.
(Footnote continued on next page.)

Agency issued Employee a Form 1 which indicated that her position remained in the Excepted Service pursuant to PL 93-198 (The District of Columbia Self-Government and Governmental Reorganization Act of 9173).[2]

Over the next three years, Employee was promoted to Legislative Information

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(Footnote continued from preceding page.)

A number of positions were excluded from coverage under the joint regulations, but Employee's position was not one of them. However, by letter dated October 26, 1967, the D.C. Commissioner notified the CSC that the District government will except from the provisions of the joint regulations those positions which function organizationally as part of the immediate staff of the Commissioner, the Assistant to the Commissioner and the Chairman of the City Council.

Although it was not an issue in this case, we note that there is no evidence of a joint agreement between the D.C. Commissioner and the CSC to amend the regulations to include Employee's original position or any position which she subsequently held. Nor is there any indiction that Employee ever occupied a position which was part of the immediate staff of the Commissioner, the Assistant Commissioner or the Chairman of the City Council.

[2] Pl 93-198 is codified at D.C. Code § 1-221 (c) and states:

> The Council may establish and select such other officers and employees as it deems necessary and appropriate to carry out the functions of the Council.

Aide, GS-9; Legislative Services Specialist, GS-11; and Legislative Services Specialist GS-13. Each position was classified in the Excepted Service.

On April 5, 1984, Agency changed the title of Employee's position from Legislative Services Specialist to Supervisory Legislative Services Specialist. Agency issued a Form 1 which documented this change. However, the Form 1 did not indicate that Agency had made any changes in Employee's Excepted Service status since she was originally hired for the position.

In Employee's view, she was no longer a member of the Excepted Service because, pursuant to the automatic transfer provisions of D.C. Code Ann. § 1-602.4(c), she had transferred into the Career Service as of January 1, 1980. Therefore, on May 3, 1984, Employee filed a grievance with Agency requesting that it correct her Form 1 to reflect her Career Service status.

On January 9, 1987, Agency found that Employee's position was properly classified in the Excepted Service and denied her grievance. Employee appealed Agency's decision to this Office on January 27, 1987.

While Employee's appeal was pending before this Office, Agency terminated her employment effective December 31, 1990. On January 14, 1991, Employee requested that the Office allow her to amend her appeal to include a challenge to her termination. The Administrative Judge (A.J.) granted

Employee's motion by order issued March 4, 1992.

After reviewing the legal arguments of the parties, the A.J. found that D.C. Code Ann. § 1-602.4(c) automatically transferred Employee into the Career Service on January 1, 1980. The A.J. further found that Agency had not subsequently transferred Employee into any other service. Based on these findings, the A.J. concluded that Agency erred in denying Employee's grievance concerning her service status. With regard to Employee's termination, the A.J. found that Agency removed her without cause in violation of D.C. Code § 1-617.1(b) and without the adverse action procedures required by D.C. Code Ann. § 1-617.3(a)(1).

Therefore, by initial decision issued July 8, 1992, the A.J. ordered Agency to reinstate Employee to her former position and directed Agency to correct Employee's personnel records to reflect that she has been in the Career Service since January 1, 1980. However, on August 12, 1992, Agency filed a petition for review before the full Board contending that the initial decision is based on an erroneous interpretation of law. Employee filed her opposition to Agency's petition on August 21, 1992.

The record in this case shows that, on October 9, 1987, Agency moved to dismiss Employee's appeal on the grounds that D.C. Office of Personnel (DCOP) Rules 1600.1(g) and 1630.2 prohibit City Council employees from appealing grievances to this Office. Agency notes that the A.J. did not rule on

its motion.[3] It is not clear whether Agency is reasserting this motion on appeal before the full Board, however, we thing it important to clarify this Office's jurisdiction to review this appeal.

At the outset, we note that this Office's jurisdiction over grievances is conferred by statute, not DCOP regulations.[4] D.C. Code Ann. § 1-603.1(10) defines a grievance as:

> [A]ny matter under the control of the District government which impairs or adversely affects the interest, concern, or welfare of employees.

Employee's dispute as to her personnel status clearly constituted a grievance within this broad definition. D.C. Code Ann. §§ 1-606.4 and 1-617.2 require District government agencies to establish procedures for the resolution of employee initiated grievances. Pursuant to these statutory requirements, Agency established its grievance procedures. See 29 D.C. Reg. 874 (1982) which includes

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[3] See Agency's petition for review, page 4, footnote 4.

[4] Moreover, DCOP regulations do not state that Council employees are barred from appealing to this Office. Instead, DCOP regulations simply prohibit Council employees from pursuing their grievances under the regulations issued by the Mayor. Although Council employees are excluded from DCOP's regulations, the are nevertheless able to pursue their grievances under the regulations issued by the Council.

procedures for both adverse actions and grievances.

Employee grieved her personnel status pursuant to Agency's regulations and, although there was some dispute as to whether she was covered by those procedures, she nevertheless received a final Agency decision on her grievance.[5] Subsection (j) of Agency's grievance procedures provide that, if an employee is dissatisfied with the outcome of the grievance proceedings, he or she may appeal to the Office of Employee Appeals. This information is consistent with § 1-606.3(a) which allows this Office to assume jurisdiction over grievances resolved pursuant to Subchapter XVII, D.C. Code Ann. § 1-617.1 et seq. Thus, this Office has jurisdiction over Employee's appeal.

With regard to the merits of this case, Employee does not dispute that, between March 19, 1979 and December 31, 1979, she occupied positions in the

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[5] Even if Employee were not covered by Agency's procedures, she has a statutory right to pursue her grievance and that right is not contingent on whether she is in the Career or Excepted Service. See § 1-610.5 which states that Excepted Service employees have all rights under the CMPA except the right to appeal their termination. See Jenkins v. D.C. Public Schools, OEA Docket No. J-0050-91, Opinion and Order issued September 20, 1991, ___ D.C. Reg. ___( ), aff'd, District of Columbia Public Schools v. Andrew Jenkins, III, 91 MPA 18, (D.C. Super. Ct. 1992), for a discussion on the distinction between adverse actions and grievances.

District government which were exempt from the federal Civil Service. What Employee does dispute is that her status remained unchanged after the District government established its own personnel system pursuant to the D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Code Ann. § 1-601 et seq. (1981).[6]

D.C. Code Ann. § 1-602.4 (c) states in pertinent part:

> On January 1, 1980, all persons employed by the District of Columbia government, including those persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-637.1, shall automatically transfer into the appropriate

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[6] Agency also noted that, from 1972 until the date of her termination, Employee's Form 1's have consistently indicated that her position was in the Excepted Service. Agency argues that these personnel documents are dispositive of her status. However, the Form 1 does not, by its own force and effect, control an employee's personnel status. Instead, the Form 1 simply documents an action that has already taken place. See Employee v. Agency, OEA Docket No. 1602-0157-81, 31 D.C. Reg. 4574 (1984), aff'd. Opinion and Order, 31 D.C. Reg. 4582; National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981); Grigsby v. U.S. Department of Commerce, 729 F.2d 772 (Fed. Cir. 1984). Even if the Form 1 normally controlled Employee's personnel status, the Form 1 was superseded by § 1-602.4 which automatically transferred her into the Career Service.

personnel system as established pursuant to subchapter VIII and IX of this chapter or § 1-610.4 or 1-610.9. (Emphasis added).

The above cited provision makes clear that on January 1, 1980, Employee automatically transferred into one of the new services established under the CMPA. There were three services into which Employee could transfer: the Career Service established pursuant to Subchapter VIII, D.C. Code Ann. § 1-608.1 et seq.; the Educational Service established pursuant to Subchapter IX, D.C. Code Ann. § 1-609.1 et seq.; and the Excepted Service established pursuant to Subchapter X, D.C. Code Ann. § 1-610.1 et seq.

Employee could not transfer into the Educational Service because it was limited to the educational employees of the District of Columbia Board of Education and the University of the District of Columbia. See D.C. Code Ann. §§ 1-602.3(a), 1-603.1(6), and 1-609.1(a).

The question before us is whether Employee automatically transferred in the Career or Excepted Service. Agency asserts that a transfer into the District's Career Service would give Employee greater rights than she had in the federal Excepted Service and thereby violate D.C. Code Ann. § 1-242(3) which mandates that certain personnel benefits remain at least equal to those established under the former Civil Service System. According to Agency, when § 1-602.4(c) is read in conjunction with § 1-242(3), it is clear that existing

Excepted Service employees transferred into the new system with no change in their personnel status. We disagree.

In the 1973 Home Rule Act, D.C. Code Ann. § 1-201 et seq., Congress directed the District government to establish its own comprehensive personnel system to replace the existing federal system. Congress was careful to ensure that the District's new personnel system did not diminish the rights which existing District government employees had under federal legislation. D.C. Code Ann. § 1-242(3) states in pertinent part:

> Personnel legislation enacted by Congress prior to or after January 2, 1975 ... shall continue to be applicable until such time as the Council shall, pursuant to this section provide for coverage under a District government merit system ... The system may provide for continued participation in all or part of the Federal Civil Service System and shall provide for persons employed by the District government immediately preceding the effective date of such system personnel benefits ... at least equal to those provided by legislation enacted by Congress, or regulation adopted pursuant thereto, and applicable to such officers and employees immediately prior to the effective date of the system established pursuant to this Act.

Although § 1-242(3) prohibited the Council from diminishing certain rights of

existing District government employees, it did not prohibit Council from increasing those rights. Thus, the Council was free to transfer former federal Excepted Service employees into the District's new Career Service without violating § 1-242(3).

When the Council enacted the CMPA, it did not make any provision for the wholesale transfer of existing federal Excepted Service employees into the District's new Excepted Service. Instead, the Council created a limited Excepted Service and enacted § 1-602.4(c) which only provided for the automatic transfer of former federal Excepted Service employees who occupied positions covered by § 1-610.4 (governing special appointments) or § 1-610.9 (governing the appointment of attorneys).[7]

The principle of expresso unius est exclusio alterius is helpful in ascertaining the legislature's intent with regard to § 1-602.4(c). Under this principle, when the legislature expressly mentions one thing from a specific class in a statute, the exclusion of all other things in that class is implied because there is an inference that all omissions should be understood as exclusions. McCray v. McGee, 504 A.2d 1128 (D.C. 1986).

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[7] In its outline of the CMPA, the Committee on Government Operations described Title IX (D.C. Code § 1-610.1 et seq.) as a provision which establishes a limited Excepted Service. See Committee on Government Operations Report on Bill No. 2-10, page 67, July 5, 1978.

After applying the principle to this case, we conclude that, by mentioning only §§ 1-610.4 and 1-610.9, the Council did not intend for § 1-602.4(c) to automatically transfer into the new Excepted Service any former federal Excepted Service employee except those who occupied positions covered by §§ 1-610.4 or 1-610.9. Since Employee did not occupy a position covered by § 1-610.4 or § 1-610.9, she did not automatically transfer into the new Excepted Service pursuant to § 1-602.4(c). The only other service into which Employee could transfer pursuant to § 1-602.4(c) was the Career Service.

Agency points out that § 1-602.4 is a general transfer provision for non-Council employees. With regard to its own employees, Agency asserts that the Council enacted § 1-610.7 which specifically transferred the Council's former Excepted Service employees into the District's new Excepted Service. Agency contends that the general provisions of § 1-602.4 must give way to the specific provisions of § 1-610.7.

It is well settled that specific provisions will usually take precedence over general provisions in the same statute. See Office of People's Counsel v. Public Service Commission, 477 A.2d 1079 (D.C. 1984). However, § 1-610.7 does not specifically transfer Employee's position into the Excepted Service.

D.C. Code Ann. § 1-610.7, states in pertinent part:

> Persons holding appointments in the District of Columbia government, paid from appropriations made to the Council of the District of Columbia[8] and classified as a GS-10 or less under § 5332 of Title 5 of the United States Code and whose position would not be in the Excepted Service under the provisions of this subchapter on January 1, 1980, shall be appointed to the Career Service created in subchapter VIII of this chapter, if such incumbent is found to possess the minimal qualifications for the position to which he or she is appointed.

Under § 1-610.7, an existing employee of the Council is effectively transferred into the Career Service if that employee occupies a position at or below the GS-10 level. However, Employee was graded as a GS-13 and § 1-610.7 contains no corresponding language which specifically transfers into the Excepted Service those Council employees whose positions were graded above GS-10. Indeed, § 1-610.7 makes no provision whatsoever for the transfer of any Council personnel into the

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8 We assume that the phrase "paid from appropriations made to the Council of the District of Columbia" refers to appropriations made for the Council's own operating budget rather than to appropriations made to the Council for the city's budget as a whole. Therefore, we conclude that when the statute refers to a person holding an appointment paid from appropriations made to the Council it means "employee of the Council."

Excepted Service. Consequently, § 1-610.7 cannot be construed as a specific provision governing Excepted Service appointments which would take precedence over the general appointment provisions of § 1-602.4.

Agency asserts that if § 1-610.7 is not construed as a transfer provision for Excepted Service employees, then the provision is rendered superfluous because, under the reasoning of the initial decision, the employees covered in this provision were already transferred into the Career Service under § 1-602.4. Relying on Office of the People's Council v. Public Service Commission, supra, Agency argues that it is improper to interpret the statute in a manner that renders a provision redundant or superfluous.

There is no question that a statute should be construed so that effect is given to all of its provisions. No part of the statute should be construed so that it is rendered inoperative, superfluous, void or insignificant. See Sands, Sutherland on Statutes and Statutory Construction §46.06 (4th ed. 1985 Revision).

With regard to the provision at issue in this case, it is possible that the Council intended for its employees to automatically transfer into the Excepted Service and enacted § 1-610.7 to create an exception for those employees who occupied positions at the GS-10 level and below. However, this interpretation is not necessarily compelled.

Another equally plausible interpretation is that the Council did not intend to mandate a transfer into the Excepted Service of any of its employees. Instead, the Council could have intended to handle this like any other administrative agency and leave it to the discretion of its personnel authorities to determine whether (and which) employees should be appointed to the Excepted Service pursuant to § 1-610.3(a)(3)[9] (which authorizes each agency to hire a specific number of Excepted service employees). The Council could have also intended that, consistent with § 1-610.2, its Excepted Service personnel be limited to individuals whose primary duties are of a policy determining, confidential, or policy advocacy character and who report directly to the head of an agency.[10] Thus, in order to ensure that its Excepted Service personnel were appointed consistent with § 1-610.2, the Council could have enacted § 1-610.7 (which transfers into the Career Service those employees graded GS-10 and below) as a limitation on the appointment authority conferred in § 1-610.3(a)(3).[11]

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[9] The text of § 1-610.3 is reproduced on page 14 of this Opinion.

[10] Although Employee's position may have involved making policy decisions, she did not report to the head of the agency - which in this case was the Chairman of the Council.

[11] We note that § 1-610.3 became effective on March 18, 1979. See D.C. Code § 1-637.1(a). The automatic transfer of employees under § 1-602.4 (c) took place on January 1, 1980. Under this

(Footnote continued on next page.)

Neither the language of the statute nor its legislative history clearly indicates the Council's intent to transfer its higher graded employees into the Excepted Service. In the absence of some clear expression of a contrary intent by the legislature, we see no sound basis for concluding that the Council intended to prevent its employees from transferring into the Career Service pursuant to § 1-602.4(c).

Even if we were to conclude that the Council intended to transfer its higher graded employees into the Excepted Service, that intention would not, in and of itself, provide a basis for this Office to create a transfer provision where non exists. In order for us to conclude that the Council's employees automatically transferred into the Excepted Service, we would not only have to find that the Council intended this result but we would also have to find language in the CMPA which is flexible enough to be construed as a transfer provision.

(Footnote continued from preceding page.)

alternative interpretation, if the Council intended for its personnel authorities to determine whether (and which) employees should be appointed to the new Excepted Service, then those personnel authorities had approximately nine months to make that determination. When the Council's personnel authorities failed to appoint Employee to the new Excepted Service pursuant to § 1-610.3(a)(3) by January 1, 1980, Employee transferred into the Career Service along with other employees of the District government.

Alternatively, Agency argues that it properly placed Employee in the Excepted Service pursuant to § 1-610.3(a)(3) which automatically appoints all of its employees to the Excepted Service except for the permanent technical and clerical employees of the Secretary or General Counsel. We disagree.

Section 1-610.3 (1981 ed.) states in pertinent part:

> (a) Under qualifications issued pursuant to § 1-610.1, each appropriate personnel authority may appoint persons to the Excepted Service as follows:
>
> > (1) The Mayor may appoint persons to service as his or her personal staff, to be paid from funds appropriated for the Office of the Mayor;
> > (2) The Mayor may appoint persons to 100 positions, which may be allotted at the Mayor's discretion, among subordinate agencies of the District;
> > (3) All employees of the Council of the District of Columbia, except those permanent technical and clerical employees appointed by the Secretary or General Counsel;[12]

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[12] Unlike § 1-610.7 which refers to all Council employees at grades of DS-10 and below, § 1-610.3(a)(3) only refers to the Council's technical and clerical employees appointed by the Secretary or General Counsel.

(4) The District of Columbia Board of Education may appoint 25 persons;
(5) The Board of Trustees of the University of the District of Columbia may appoint officers of the University, persons who report directly to the President, persons who head major units of the University, academic administrators and persons in a confidential relationship to the foregoing, exclusive of those listed in the definition of the Educational Service;
(6) The District of Columbia Hospital Commission may appoint 10 persons;
(7) Each other personnel authority not expressly designated above may appoint 2 persons.[13]

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[13] The A.J. noted that the use of the words "may appoint" suggests that this section permits Agency to make appointments to the Excepted Service but does not mandate it. Agency argues that because the words "may appoint" are repeated in every subsection except § 1-610.3(a)(3), the Council intended for the appointment of its employees to be mandatory. However, the word "may" as opposed to the word "shall" is indicative of discretion or choice between two or more alternatives and should not be construed as a word of command unless there is something in the context or subject matter of the statute to indicate that the legislature intended to use the word in that sense. See Farmers & Merchants Bank v.Federal Reserve Bank, 262 U.S. 649 (1923); U.S. v. Cook, 432 F.2d 1093 (7th Cir. 1970); Bennet v.

(Footnote continued on next page.)

When § 1-610.3 is read in its entirety, this provision does nothing more than authorize each agency to hire a specific number of Excepted Service employees.[14] For the purposes of § 1-610.3, the Council is treated like any other District agency except that § 1-610.3(a)(3) authorizes the Council to have an unlimited number of Excepted Service employees in non-technical and non-clerical positions. There is no indication in the language of this statute, or in its

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(Footnote continued from preceding page.)

Panama Canal Co., 475 F.2d 1280 (D.C. Cir. 1973). This is particularly true where the words "may and "shall" appear in close juxtaposition in other parts of the same statute. See U.S. v. Tapor-Ideal Diary Co., 175 F. Supp. 678 (N.D. Ohio 1959), aff'd 283 F.2d 869 (6th Cir. 1960); Bennet, supra. We need look no further than §§ 1-610.1 and 1-610.5 to see this contrast between "may" and "shall" used in the CMPA. In this case, the language in § 1-610.3(a) which states "each appropriate personnel authority may appoint persons to the Excepted Service as follows" is connected to subsections 1 through 7 by a colon. This creates one compound sentence. Since the words "may appoint" are used in the first clause of this sentence, absent some clear legislative intent to the contrary, repeating the words (or omitting them) throughout the subsections of that same sentence has no effect on the permissive nature of this provision.

14 We note that when the Committee on Government Operations outlined the CMPA, it referred to this section only as one which "authorizes the number of Excepted Service employees." See Committee on Government Operations Report on Bill No. 2-10, page 68, July 5, 1978.

legislative history, that the Council intended § 1-610.3 to effect an automatic transfer of an employee into the Excepted Service simply because that employee's agency was authorized to have a limited (or unlimited) number of Excepted service positions. Furthermore, there is no indication that the personnel authority for the Council ever appointed Employee to an Excepted Service position pursuant to § 1-610.3(a) (3).

Finally, Agency asserts that the initial decision's interpretation of the law would mean that every employee of the individual Councilmembers and of each committee within the Council transferred into the Career Service on January 1, 1980. According to Agency, such a transfer would create a permanent pool of Career Service employees whose tenure could exceed that of the Councilmember who hired them and prevent new Councilmembers from hiring their own staff. Agency contends that this result is clearly beyond the intent of the law.[15]

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[15] Agency also cited, as authority, statements made in 1987 by then-Council Chairman David Clarke. his final decision on Employee's grievance. Chairman Clarke's statements, incorporated into his final decision denying Employee's grievance, reflect his view that the Council, by enacting the CMPA in 1978, did not intend to place its higher graded employees in the Career Service. However, we cannot rely on Chairman Clarke's statements as an interpretive aid in construing this statute. It is generally held that the post-enactment statements made by members of the legislature which enacted the statute, and the views expressed by members of

(Footnote continued on next page.)

Former Council Chairman Dixon recognized that the CMPA's transfer provisions could have an anomalous result with regard to employees of the individual Councilmembers and the Council's committees. Therefore, on March 5, 1981, Chairman Dixon submitted a memorandum to the Council which stated:

> I have attached an amendment to Bill 4-38 as it has been reported by Mr. Spaulding's Committee on Government Operations. My amendment will clarify an ambiguity in the Merit Personnel Act concerning the appeal rights of employees of the Council working for an individual Member or his or her Committee. The amendment provides that the decision of the Member or the Chairperson in removing the employee is final, and not subject to further internal administrative review or review by the Office of Employee Appeals. This amendment will have no impact upon Career Service employees working for the officers of the Council.

(Footnote continued from preceding page.)

subsequent legislatures as to the meaning of acts passed by previous legislatures, do not become part of the legislative history of the original enactment and are accorded little weight in its interpretation. See Sands, Sutherland on Statutes and Statutory Construction §48.16 (4th ed. 1985 Revision).

The Council adopted the Chairman's amendment in D.C. Law 4-7 and it became effective on June 11, 1981.

D.C. Code Ann. § 1-610.5 governs the procedural rights of Excepted Service employees. Prior to the adoption of D.C. Law 4-7, the last two sentences of § 1-610.5 stated:

> The employee does not have any right to appeal the termination. All other provisions apply to Excepted Service employees.

D.C. Law 4-7 amended § 1-610.5 by adding the following to the last sentence:

> Except, that persons employed by the Council of the District of Columbia by personnel authorities identified in § 1-604.6(b)(3)(B) may have their employment relationship terminated by the member or chairperson of a committee of the Council of the District of Columbia employing them without further review by way of grievance or adverse action administrative appeals.

Employee worked for the secretary of the Council and not an individual Councilmember or committee. Our decision in this case only pertains to the employees working for the officers of the Council and, in no way, impairs the right of an individual Councilmember or committee chairperson to terminate their employees pursuant to § 1-610.5. Therefore, we see no basis for concluding

that the initial decision erroneously interprets the law.[16]

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[16] Since Agency removed Employee from her position without cause, the A.J. ordered Agency to reinstate her to her position with back pay. Agency has not challenged the authority of this Office to provide such a remedy. Therefore, we view Agency as having waived any objections on this issue.

ORDER

Accordingly, it is hereby ORDERED that Agency's petition for review is DENIED.

FOR THE BOARD: /s/
Alton E. Woods, Esq.
Chair
Office of Employee Appeals

June 17, 1993
Date

[wp51/A:/301/RAB/dnj/Clay.oo]

ALL BOARD DECISIONS ARE PREPARED BY THE GENERAL COUNSEL'S OFFICE
RICHARD A. BEVERLY, ESQUIRE, GENERAL COUNSEL

The initial decision in this Matter shall become a final decision of the Office five (5) days after the issuance of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior court of the District of Columbia within thirty (30) days after formal notice of the decision or order sought to be reviewed.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BEFORE THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:

RACHEL L. CLAY

Petitioner

and

COUNCIL OF THE DISTRICT OF COLUMBIA,

Respondent.

OEA Docket No. 1602-0045-87

ELSA D. NEWMAN, HEARING EXAMINER

SUGGESTION OF UNCONSTITUTIONALITY OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT OF 1973 AND THE DISTRICT OF COLUMBIA GOVERNMENT COMPREHENSIVE MERIT PERSONNEL ACT OF 1978

NOTICE PURSUANT TO SUPER. R.C.P. 24 TO THE ATTORNEY GENERAL OF THE UNITED STATES; U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA; AND THE CORPORATION COUNSEL OF THE DISTRICT OF COLUMBIA

In this Motion, petitioner RACHEL L. CLAY, by and through her counsel, Bruce

Comly French, suggests to the Hearing Examiner that the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (the "Home Rule Act") (codified at scattered sections of the D.C. Code) and the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Code § 1-601.1 et seq.) may be unconstitutional.

It is hoped that the Hearing Examiner will be able to resolve the claims presented by the petitioner without resort to administrative or judicial invalidation of these two statutes.

In Gary v. United States, 499 A.2d 815 (D.C. 1985) (en banc), cert. denied 475 U.S. 1086 (1986), the District of Columbia Court of Appeals held that the principles of Bicameralism and Presentment discussed in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) applied to the Congress's and the President's relationship with the District of Columbia. Thus, enactments of the Council of the District of Columbia could not be summarily rejected by the one-or two-House veto provisions found in the original Home Rule Act. In 1984, the Home Rule Act was amended by the Congress to cure the Bicameralism defect; no action was taken to cure the Presentment Clause defect. [See attached law review article - *Can Home Rule in the District of Columbia Survive the Chadha Decision?* - which more fully discusses this matter.] Subsequent decisions of the District of Columbia Court of Appeals have not swayed form its earlier Gary evaluation of Chadha. See McClough v.

United States, 520 A.2d 285 (D.C. 1987) (discussing the initiative process).

While this counsel does not believe that the Office of Employee Appeals has the authority to conclude that its organic authorizing act is unconstitutional, one aberrant three-judge District Court opinion could be read to the contrary. Doe v. Martin, 404 F. Supp. 753, 762-63 (D.D.C. 1975) (Three Judge Court), but see, 404 F. Supp. at 763 (Gesell, J. dissenting), Thus, out of an abundance of caution, counsel presents this memorandum to the Hearing Examiner for her consideration.

Respectfully submitted,

/s/

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[Law Review article omitted.]

CERTIFICATE OF SERVICE

I, Bruce Comly French, certify that I have caused a copy of the foregoing Suggestion of Unconstitutionality, etc. to be served this 12th day of November, 1991, by first class mail, postage prepaid to:

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Hearing Examiner
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/s/
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